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JURISDICTION OVER CYBER TORTS UNDER BRUSSELS I BIS REGULATION



TEAM ROMANIA

Georgiana Gabriela Georgescu

Paula Maria Marin

Daniela Vasile

Trainer: Gabriela Florescu

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Chapter 1. Introduction

1.1. The Internet nowadays

The Internet, as a global platform without any territorial frontiers, seems to be the perfect means to realize an internal market, which has been the predominant goal of the European Union since its foundation in the early 1960s. Hence, it is not a big surprise that policies to foster the Internet and promote E-commerce, as well as any kind of electronic communication and transactions, have always been a core element in EU policy, setting since the middle of the 1990s¹. The Commission explicitly formulated an Internet policy as an integrated strategy for the first time in 2005².

The EU has now adopted a far-reaching *Digital Agenda for Europe 2020*³, which is intended to set a framework for more detailed plans in each of the different policy areas, for instance, consumer protection, industrial policies or intellectual property. The EU Commission qualifies the enhancement of the digital sector, in particular the Internet, as ‘one of the seven flagship initiatives’ of the Europe 2020 strategy adopted at the Lisbon summit in 2010, with the aim to overcome the financial and economic crisis that had hit Europe’s economy⁴.

But, while the Internet operates across borders, we must acknowledge that there are loopholes with regard to its use for different purposes. Apart from virtually connecting people irrespective of borders or time limits, disseminating information and culture, there is also a practice of wrongful acts by those who take advantage from the anonymity of the network, as well as of the speed of information flow and the virtually enhanced propagation of the said acts.

The Internet is the ideal platform for freedom, which is not to say that it is a universe without law and without accountability for abuses that might occur there. Regarding the applicable law, in cases of the online infringement of personality rights or intellectual property rights, national courts have been struggling with establishing their jurisdiction in actions for liability brought by the alleged victim.

In a series of recent cases, the European Court of Justice has devised a new jurisdictional framework for jurisdiction over cyber torts under art. 5(3) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters (‘Brussels I Regulation’). In these cases, the Court has been called to rethink its classical interpretation of this provision dating back to 1976⁵. The cases concern respectively the online infringement of personality rights, the online infringement of trademark and the online infringement of copyright.

¹ A. SAVIN, J. TRZASKOWSKI, *Research Handbook on EU Internet Law*, ed. Edward Elgar, 2014, p. 3.

² COM (2005) 229 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:c11328>.

³ COM (2010) 245 final/2, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aasi0017>.

⁴ EU Digital Agenda 2020, 26 August 2010, COM (2010) 245 final/2, p. 3.

⁵ A. SAVIN, J. TRZASKOWSKI, *Research Handbook on EU Internet Law*, ed. Edward Elgar, 2014, p. 231.

In the meantime, the Brussels I Regulation has been replaced, as from 10 January 2015, by Regulation (UE) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁶ ('Brussels I BIS Regulation'), and what was art. 5(3) of Brussels I, has now become art. 7(2) of Brussels I BIS (therefore, throughout this paper, reference will be made only to art. 7(2) of the recast). Though, the wording of the provision has not been changed, and so the ECJ jurisprudence developed under the previous regulation is still applicable⁷.

1.1. Why cyber torts?

The rapid development of modern communication technologies raises significant legal challenges. Since global, or even European-wide harmonization of substantive 'cyberlaw' rules is utopian, the area of law that is most affected by the globalization and decentralization of communication is the one concerning the rules on jurisdiction. The topicality of the issue represented the main reason for choosing this theme for our writing.

Torts and delicts against personality rights in cyberspace, in particular, raise difficult questions relating to jurisdictional rules because there must be maintained a balance between the claimant's personality rights and the defendant's communication freedoms, as stipulated in Articles 8 and 10 of the European Convention on Human Rights (ECHR), also articles 7 and 11 of the Charter of Fundamental Rights of European Union. The nucleus of the conflict is that too wide jurisdictional claims are to the detriment of the defendant's freedom of speech, while too narrow interpretations might deprive the claimant of legal remedies to protect his personality rights.

Also, a vast part of online infringements is related to intellectual property rights (IPRs) and ECJ's case-law on this matter had its starting point in the Court's jurisprudence regarding online infringement of personality rights.

After presenting the European Court of Justice's most relevant decisions regarding jurisdiction under what is now Article 7(2) of Brussels I BIS Regulation, our writing argues that the ECJ's jurisprudence regarding torts committed via the Internet requires refinement and reconsideration and makes proposal for such an approach.

Chapter 2. The classical interpretation of article 7(2) of Brussels I BIS Regulation

Brussels I BIS Regulation has established the fundamental principle that a person must be sued in the court of the Member State where the person is domiciled - Article 4 (1). This would mean, with regard to

⁶ OJ, L351/1, 20.12.2012.

infringements on a website, that any court action would have to be filed with the court of the Member State of the responsible person, and this could cause severe obstacles for the person that is affected by an infringement. However, Article 7(2) provides an exception to the aforementioned principle which – especially with regard to Internet based infringements – turns the table.

Article 7(2) of Brussels I BIS Regulation provides as follows: ‘A person domiciled in a Member State may, in another Member State, be sued ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.’ This definition covers a wide range of claims, including actions for defamation and infringement of intellectual property rights. The rationale of art. 7(2) is that it provides for a better efficiency of proceedings and administration of justice, as the place where the harmful event occurred is meant to have particularly close connecting factors with the dispute. The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence⁸.

The tort rule was first interpreted by the Court of Justice in *Bier v Mines de Potasse d’Alsace*⁹ (1976), which involved environmental damage caused by negligence. In that case, the Court ruled that, what is now art. 7(2) of Brussels I BIS Regulation, allows the claimant to bring an action, at his option, either before the courts of the place *where the damage occurred*, or before the courts of the place *of the event which gives rise to and is at the origin of that damage*, in other words that is where the event giving rise to damage produces its harmful effects upon the victim.

One of the reasons given by the Court for that duplication of jurisdiction is that the place of damage often coincides with the place of the defendant’s domicile under art. 4 (1), so that having that location as the sole connecting factor under art. 7(2) would render this provision ineffective. Secondly, a decision in favor only of the place where the damage occurred would, in cases where the place of the event giving rise to the damage does not coincide with the domicile of the person liable, have the effect of excluding a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage¹⁰.

The findings in *Bier* were revised by the ECJ in *Shevill*¹¹, where the Court has further limited the scope of the *forum damni*. ECJ ruled that the courts of the Member State where damage occurred may only adjudicate the claim in respect of the portion of the damage that occurred in that State. By contrast, the courts of the Member State where the event giving rise to damage occurred can adjudicate the whole dispute. This restriction is based on the consideration that court of the place where damage occurred is the best placed to

⁷ Recital 34 of Brussels I BIS Regulation.

⁸ CJEU Case C-189/08, *Zuid Chemie*, EU:C:2009:475, para. 24 (and the case law cited).

⁹ CJEU Case C-21/76, *Handelskwekerij Bier/Mines de Potasse d’Alsace*, EU:C:1976:166.

¹⁰ *Ibid*, para. 21.

¹¹ CJEU Case C-68/93, *Shevill and Others v Presse Alliance*, EU:C:1995:61.

assess the libel committed in that State – and not elsewhere – and to determine the extent of the corresponding damage¹².

The case of *Shevill* involved an action for non-material damages allegedly caused by the distribution of a defamatory newspaper article in several Member States. The claimant, a United Kingdom national resident in England, considered the article defamatory and brought libel proceedings before the English High Court in respect of the copies of the newspaper distributed and sold in England and Wales. The publisher, a company incorporated under French law and registered in Paris, sought to challenge the jurisdiction of the High Court on the grounds that no harmful event within the meaning of art. 7(2) had occurred in England.

The Court ruled that in such context, the victim may bring an action for damage to his reputation against the publisher, either before the court of the place where the publisher is established – place where the event giving rise to damage occurred, in which case the court has jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Member State where the publication was distributed and where the victim claims to have suffered injury to his reputation – place where the damages occurred, in which case the courts have jurisdiction to rule solely in respect of the harm caused in the States of the court seised¹³, the so-called ‘Mosaic principle’¹⁴.

But these findings are misleading in one aspect: the fact that the claimant may sue before the courts of the state where the publisher is established already follows from art. 4 Brussels I BIS Regulation, and not from art. 7(2). However, it follows from Article 7(2) that the claimant may sue at the place in which the publication originated. This might mostly be the country where the publisher is established; however, this is not necessarily the case.

The ‘*Shevill* doctrine’ considers the necessity to concentrate lawsuits aiming at full compensation to just one – or maximally two – jurisdiction(s). However, it also allows the claimant to bring a lawsuit where he has been defamed, albeit the lawsuit is limited to the harm caused in this jurisdiction. In conclusion, *Shevill* strikes a fair balance between the interests of the publisher and of the allegedly defamed person: the publisher of the contested statement may choose the country where to establish his business and – at least to a certain degree – where to publish his article, and may calculate the risk of running into a lawsuit in these places. *Shevill* is also practical, as the place of the publication can be easily recognized by ascertaining the number of newspaper copies sold in a particular country or by establishing where a certain TV programme has been broadcast.

¹² *Ibid.* para. 31.

¹³ *Ibid.*, para.33.

¹⁴ <http://dx.doi.org/10.1080/13600869.2012.698842>

Chapter 3. Jurisdiction over cyber torts

3.1. Theoretical interlude

At this point of our analysis it seems appropriate to provide some background explanations regarding the methods proposed over the years in order to determine torts jurisdiction pursuant to Brussels I BIS Regulation. Legal literature has classified them as follows¹⁵: the `access approach`, the `targeting doctrine` (or the `theory of focalisation`) and the `causal event` rule.

According to the access-based test, as the name itself suggests, a defendant may be sued in any jurisdiction where the infringing content could be accessed online. Despite presenting undeniable advantages to the plaintiffs, the access approach has been criticized for several reasons. It has been contended, in particular, that it opens the door to jurisdictional abuse (e.g. pursuing of various insignificant claims, forum shopping by the right holders) and that it undermines the principle of a close connection between the court seised and the action¹⁶, enshrined in recital 16 of Regulation 1215/2012. Furthermore, it would fail to strike a fair balance between the interests of the claimants and the interests of the defendants, as the latter could not reasonably foresee in which of the available jurisdictions would the former choose to sue.

The `targeting doctrine` (also named `the theory of focalisation`¹⁷ or `exploitation`) proposes that jurisdiction should be vested only in the courts of those Member States towards which the harmful activity has been directed, which implies intent to target a specific audience on the part of the potential infringer. In its previous case-law, the Court of Justice provided several criteria in order to determine the targeting intention. In *Lagardère Active Broadcast* it ruled that amongst the parameters taken into account ought to be included, `in particular, the actual audience, the potential audience and the language version of the broadcast`¹⁸ (that case involved acts of broadcasting by a television station, but we consider them applicable to a website as well). In *Donner* it mentioned, again, the language of the website as a relevant factor, alongside its content and the distribution channels of a trader¹⁹.

Pammer and Hotel Alpenhof case dealt with jurisdiction regarding contracts concluded with consumers, under Article 17(1)(c) of Regulation 1215/2012, but the Court here also provides a series of criteria for determining whether a certain activity is directed towards a Member State that may be transposed in torts cases: the international nature of the activity at issue, such as certain tourist activities; mention of

¹⁵ See, for instance, R Matulionyte, `Enforcing Copyright Infringements Online. In Search of Balanced Private International Law Rules, in Journal of Intellectual Property, Information Technology, and Electronic Commerce Law (JIPITEC), vol. 6, no. 2/2015, p. 133, available at <http://www.jipitec.eu/issues/jipitec-6-2-2015>, last accessed April 21st 2016.

¹⁶ M Husovec, `Comment on «Pinckney»`, in International Review of Intellectual Property and Competition Law (IIC), vol. 45, no. 3/2014, p. 372-373.

¹⁷ Opinion Of Advocate General Jääskinen in *Pinckney v. KDG Mediatech AG*, Case C- 170/12, ECLI:EU:C:2013:400, para 64.

¹⁸ ECJ, Judgment in *Lagardère Active Broadcast*, C-192/04, EU:C:2005:475, para 46 *apud* S Depreeuw and J-B Hubin, `Of Availability, Targeting and Accessibility`, in Journal of Intellectual Property Law & Practice, 2014, vol. 9, 9/2014, p. 753.

telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example ‘.de’, or use of neutral top-level domain names such as ‘.com’ or ‘.eu’²⁰.

It should be noted that in all the cases where the Court analyzed the meaning of ‘targeting’ or ‘directing’, it held that the fact that a website is merely accessible in a Member State is not enough to establish the targeting intention.

Notwithstanding that CJEU indicated some factors to be taken into consideration, the ‘targeting approach’ may be at times problematic as it seems to be rather fact specific, without providing clear general principles, which risks undermining predictability in this area of the law. Among the practical issues identified are the following²¹: how to establish the targeting intention in case of websites using a *lingua franca* such as English and having a popular content throughout the EU, like file-sharing websites? A similar problem may arise even for lesser used languages, since it is not clear whether a website in Romanian would target only Romanian speaking people living in this Member State or Romanian emigrants living abroad as well.

It has been suggested that the ‘directed to’ test would more efficiently be used at the level of the substantive law, instead of when deciding on the preliminary matter of jurisdiction²².

Finally, according to the ‘causal event’ method, the place of the harmful event would be only the place from where the defendant acted to initiate the allegedly infringing activity. This test has been objected to, based on the fact that it would weaken the position of the right holders since in the majority of cases the place from where the defendant acted would be situated in foreign jurisdictions. Also, most of the time, it would lead to the same result as the ‘defendant’s domicile’ rule, as usually the act of infringement takes place where the alleged perpetrator is established²³.

3.2. Online infringement of personality rights

Internet websites can technically be accessed almost everywhere in the world. If the *Shevill* doctrine is applied to Internet publication, the publisher of a statement that violates personality rights would be subject to 28 jurisdictions in the EU alone. In order to find the appropriate jurisdictional approach to violations of personality via the Internet, the findings in *Shevill* had to be reconsidered.

¹⁹ CJEU, Judgment in *Criminal proceedings against Titus Alexander Jochen Donner*, C-5/11, EU:C:2012:370, para. 29.

²⁰ CJEU, Judgment in *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, ECLI:EU:C:2010:740, para 83.

²¹ R Matulionyte, ‘Enforcing Copyright Infringements Online’, p. 136-137.

²² *Ibid*, p. 136.

²³ *Ibid*, p. 137.

European Court of Justice first approached the application of the tort jurisdiction in cyber cases through a dispute involving personality rights, in the joined cases *eDate Advertising and Martinez and Olivier Martinez and Robert Martinez v MGN Limited*²⁴. In both cases, the claimants brought an action before the courts of their own domicile (in Germany and in France, respectively) against companies that were established in other Member States (Austria and the UK, respectively). The defendants challenged the jurisdiction of the seised courts, which led the German and French court to submit a preliminary question to ECJ to assess whether it is sufficient that the website where the content allegedly infringing upon personality rights is accessible in the State of the *forum*, or whether it is necessary to establish the existence of a complementary link between the case and the State.

The ECJ applied the traditional connecting factors devised in *Bier* and *Shevill* to the Internet context, while at the same time creating a new ground for jurisdiction. The Court consequently identified the courts of three Member States where the victims of alleged infringement of personality rights could bring proceedings.

First, the victim can bring action for liability in respect of all damage before the courts of the Member State where the publisher of litigious content places online is established. This is an application in the context of the Internet of the establishment of the publisher criterion that is applied to paper-based contents cases, as per *Shevill*. Also, the Court defines the place of the causal event by reference to the person whose liability is engaged, and not with regard of the location of the server on which the material is stored.

Second, the victim can bring an action for liability relating to all the damage before the courts of the Member State where the center of the victim's interests is based – which reflects the criterion of ‘the place where the damage occurred’. This new connecting factor is grounded on two main considerations²⁵. First, the Court takes into account the ubiquity of contents online, which results both from those contents being instantly available to Internet users all over the world, and from the difficulty in quantifying those users. According to the Court, this reduces the usefulness of the ‘distribution criterion’ applied to cases relating to paper-based infringement of personality rights, as the distribution of content placed online is, in principle, universal. Second, the Court considers the seriousness of the infringement to which the holder of a personality right is subject when a content breaching such right is available to all Internet users over the globe.

As a consequence of these two considerations, the Court has devised a new *forum* for victims infringement of personality rights caused by contents place online, which extends to all damages, and not

²⁴ CJEU joined cases C-509/09, *eDate Advertising GmbH v X* and *Olivier Martinez and C-161/10, Robert Martinez v MGN Limited*, EU:C:2011:685.

²⁵ *Ibid*, para. 45-47.

only to damages located within the *forum* State. According to the *eDate Advertising and Others*, the place where the damage occurs can be situated where the victim has the center of his interests, which often equals the victim's habitual residence, but can also be located in a Member State with which the victim has a particularly close tie, given to other factors, such as the pursuit of a professional activity. According to the Court of Justice, the courts of the Member State where the victim has his centre of interests might best assess the impact which material placed online is liable to have on individual's personality rights, so that the attribution of jurisdiction to those courts corresponds to the objective of the sound administration of justice. Also, the availability of such *forum* is also in accordance with the aim of predictability of the rules governing jurisdiction regarding defendants, as the publisher of harmful content should be in a position to assess *ex ante* the centre of interests of the person who is subject of that content, when it is placed online²⁶.

Third, and finally, the victim may bring an action before the courts of each Member State where the content placed online is, or has been accessible, in respect of domestic damage. This third criterion results from the transposition to the Internet context of the 'distribution criterion of *Shevill*, which is surprising, as the Court has justified the introduction of the 'centre of interests' criterion by the inappropriateness of the criteria of *Shevill* to the internet context²⁷.

The criterion establishing jurisdiction where the information has been published and where the claimant is known should not be upheld in Internet cases. The 'centre of interests' criterion is based on the fact that the Internet is, by mere technological reasons, ubiquitous and raises conflicts between free speech and personality rights in a very particular way. The Internet allows the publisher to control the destination of his publication, hence the jurisdictions where he might be subject to a lawsuit, only to a limited extent. The 'centre of interests' should therefore compensate for the *Shevill*'s 'distribution criterion', which was originally intended to limit the number of potential jurisdictions and to enable the publisher to predict where he could be sued, as required by the Brussels I Bis Regulation, but which is rendered almost valueless, considering the global accessibility of the online publications.

Aside from our consideration that the 'centre of interests' criterion should replace *Shevill*'s 'mosaic principle' rather than being an additional criterion, the transposition of the 'distribution criterion' to the online context does not mean that it should be applied without any limitations or restrictions. In particular, it is doubtful that *eDate* stands for the principle that mere accessibility to a website from a Member State necessarily provides jurisdiction to the courts of that Member State under art. 5(3), irrespective of the existence of any sort of link between this State and the litigious facts²⁸.

²⁶ *Ibid.*, para. 50.

²⁷ *Ibid.*, para. 46.

²⁸ A. SAVIN, J. TRZASKOWSKI, *Research Handbook on EU Internet Law*, ed. Edward Elgar, 2014, p. 237.

In conclusion, the interpretation of art. 7(2) of Brussels I BIS Regulation must reconcile the protection of the claimant's personality rights and the defendant's communication freedoms, as enshrined in Articles 8 and 10 of the ECHR and in Articles 7 and 11 of the Charter of Fundamental Rights of European Union. In cases of transnational violations of personality rights in cyberspace, a 'centre of interests' analysis strikes a fair balance between the defendant's freedom of expression and the claimant's personality rights: it is predictable for the defendant and avoids extensive forum shopping, but it also allows the claimant to sue for full compensation in the jurisdiction where the conflict essentially took place. In our opinion, a reconsideration of the *Shevill* doctrine, as proposed above, fulfils these requirements and meets, in a more adequate way, the challenges of the Internet age.

3.3. Online infringements of trademarks

3.3.1. National trademarks

Another case²⁹ has allowed the Court to confirm that the doctrine of the judgment *eDate Advertising* was specific to the infringement of personality rights. The jurisdiction of the Austrian courts was questioned with respect to an action brought by an Austrian company against a German company, which has used on the search engine "Google.de"(Google Germany) a keyword identical to a registered and protected trademark in Austria. The use of the keyword in question established a link not only with the commercial website of the Austrian trademark owner, but also with commercials made by the German company.

The Court first recalls its jurisprudence. Regarding the damage occurred, the criterion of the center of interests of the victim applied in the case *eDate Advertising and Others* is particular to the infringement of personality. It cannot be extended to an infringement of intellectual property rights such as those at issue in this case, involving a national brand whose protection is in principle limited to the state's territory for which that trademark is registered.

First, the Court points out that the expression "place where the harmful event occurred or may occur" covers both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places³⁰. Secondly, it seeks to define these two places with regard to the specific case of trademark infringement through the Internet.

As regards, first of all, the place where the damage occurred, the Court considers that it corresponds to the Member State in whose territory the trademark was registered. It follows that the

²⁹ CJEU, Judgment in *Wintersteiger*, C-523/10, EU:C:2012:220;

³⁰ ECJ, Judgment in *Mines de potasse d'Alsace*, *ibid.*; CJEU, Judgment in *eDate Advertising*, *ibid.*;

applicant can validly institute legal proceedings, on the basis of Article 7(2) of Brussels I BIS Regulation, in front of the courts of the Member State in which the trademark was registered.

According to the Court, it is for the purpose of good administration of justice that the court of the territory where the mark is protected is competent to settle the alleged infringement of a national brand, due to its ability to assess the trademark infringement and predictability because both the claimant and the defendant can expect for an Austrian brand, to have legal proceedings before an Austrian court. Also, the European Court held that the courts of the state in which the mark is registered are best placed to assess whether the brand is actually damaged because of the German site. Thus, the court where the trademark was registered would have jurisdiction, if necessary, and eventually this court could realize that there would be no damage in its territory.

The European Court has thus not considered, as it had nevertheless made regarding online violations involving personality rights³¹, that the damage could be located based on the criterion of centre of interests of the person whose rights have been infringed or the domicile of the person which is being sued.

It is true, as the Court clarifies, that "contrary to the situation of a person who considers that there has been an infringement of his personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory ". It follows that the requirement of predictability pursued by the Brussels I BIS Regulation did not impose anything in order to offer applicants an additional option.

Moreover, one can think that in matters of intellectual property, the purpose of protection of victims is less pronounced and it is not necessarily required to enable the possibility for injured parties to apply to the courts of their place of establishment.

As a result, in any case, the national court of trademark registration has jurisdiction over the dispute, which does not mean it may not exclude the infringement considering that there is no proof of damage on its territory.

Another issue would be the fact that the interpretation of the Regulation, with respect to jurisdiction, is determined by considerations relating to substantive law, namely the registration and the national protection of the trademark. It seems accurate to decide that the place of the damage must coincide with the place where the trademark is registered when assessing the substance of the dispute. However, it seems unfitting to infer that the courts of that Member State have jurisdiction over all tort cases relating to

³¹ CJEU, Jugment in eDate Avertising, *ibid.*;

this trademark. This approach is contrary to the well established principle that international jurisdiction is based on considerations which are different from those that are relevant under the substantive law³².

With regard, subsequently, to the causal event, the Court considers that it matches the behavior of the advertiser choosing a keyword identical to the trademark, and not the provider of the referencing service, who uses it in the course of trade³³. Thus, it is the place of establishment of the advertiser the one that should be taken into consideration in order to locate the place of the event giving rise to liability.

The solution may appear logical as the action at hand aimed at preventing the advertiser from trademark infringement. By contrast, it is doubtful that the same solution could have been applied if the proceedings had been brought against an intermediary, such as the referencing service provider. In respect of legal action, it would seem that the event causing the damage which is the basis of the action is the provider's activity. If this is correct, then the courts of the Member State where the provider is established would have jurisdiction. That being said, the interpretation upheld by the Court in respect of this aspect of the case seems consistent with *Shevill* and *eDate Advertising and Others* cases as the causal event is defined again by reference to the establishment of the person whose liability is at stake, and not by reference to the location of the allegedly harmful conduct of that person³⁴.

After the *eDate Advertising and Others* case, on which we reported earlier, this means another extensive interpretation of the notion 'place where the harmful event occurred' in internet-cases. At first sight, this seems at odds with the restrictive interpretation that should be given to any deviation from the general principle laid down in Article 4(1) Brussels I BIS Regulation: defendants should, as a rule, be sued for the Courts in the Member State in which they are domiciled. On the other hand, both *Wintersteiger* and *eDate Advertising and Others* deal admirably with the conflict between the place-oriented rule of Article 7(2) and the global nature of the internet. Also, in *Wintersteiger* the Court did not indulge in an interpretation along the lines of the *Pammer and Hotel Alpenhof* cases³⁵, in which the Court gave a list of criteria to determine whether a website can be said to have been 'directed' at the Member State where the consumer was domiciled. Such an interpretation in *Wintersteiger* would certainly increase legal uncertainty. Whether or not the extension of heads of jurisdiction in Google AdWord cases gives rise to forum shopping remains to be seen³⁶.

Concluding, in addition to the courts of the domicile of the defendant, on the basis of Article 4(1), the victim of a trademark infringement done through the internet can initiate a trial in civil tort liability on

³² CJEU, Case C-364/93, *Marinari*, EU:C:1995:289;

³³ CJEU, Joined cases C-364/93 and C-238/08, *Google France and Google*, EU:C:2010:159, para. 52 and 58;

³⁴ A. SAVIN, J. TRZASKOWSKI, *Research Handbook on EU Internet Law*, ed. Edward Elgar, 2014,;

³⁵ CJEU, Joined cases C-585/08 and C-144/09, *Pammer and Alpenhof*, EU:C:2010:740;

³⁶ <http://europeanlawblog.eu/?p=473>;

the basis of Article 7(2) of Brussels I BIS Regulation, in front of the courts of the member State in which the trademark is registered - which corresponds to the courts of the place of occurrence of the damage - or the courts of the place of establishment of the advertiser - which corresponds, in turn, to those of the place where the event giving rise to the damage occurred.

Beyond the many questions and criticism, this solution raised the following difficulty for litigants: should they act in the state where the trademark is registered at the risk of being told that the local public is not aimed by the event giving rise to liability or in the State of the causal event at the risk that they may be told that there is no trademark protected in that territory?

3.3.2. European Union trademarks

The European Union Trademark Regulation (CTMR) of December 1993 (in 2009 codified as Regulation [EC] No. 207/2009, amended by Regulation [EU] 2015/2424³⁷) allows the registration of European Union trademarks offering European Union-wide protection. European trademarks are administered by the European Union's trademarks and designs office, the European Union Intellectual Property Office (former OHIM), located in Alicante, Spain.

The Regulation on the European Union trademark establishes a system of specific international jurisdiction. Two categories of courts have been introduced by that Regulation: European Union trade mark courts (which are national courts) and the European Union Intellectual Property Office. In the absence of other specific rules of jurisdiction, it is appropriate to refer to the Brussels I BIS Regulation to determine which court has jurisdiction over a dispute relating to an intellectual right, when submitting foreign elements.

The relationship between the Brussels I BIS Regulation and the European Union Trademark Regulation is governed by Article 97(5) of the Regulation on the European Union trademark. This Article provides that the Brussels I BIS Regulation is applicable in litigation concerning the validity and infringement of a trademark, unless the European Union Regulation derogates. Article 97(5) specifies that Article 7(2) of the Brussels I BIS Regulation shall not apply in European Union trademark infringement.

With regard to jurisdiction in infringement actions the European Union Trade Mark Regulation, while derogating from the special rule of jurisdiction in Article 7(2) of Brussels I Recast, contains a specific provision on international jurisdiction, Article 97(5), which provides that, among other things, infringement actions "may also be brought in the courts of the Member State in which the act of infringement has been committed or threatened".

³⁷ OJ, L341/21,24.12.2015.

The ECJ has not yet been asked how this provision should be interpreted in online infringement cases. However, the Court provided some guidance in *Coty Germany*³⁸, a case concerning 'analogue' infringement. There the ECJ said that, first of all, this provision must be interpreted independently of Article 7(2) of Brussels I Recast. Then the Court clarified that "*the concept of 'the Member State in which the act of infringement has been committed' implies ... that that linking factor relates to active conduct on the part of the person causing that infringement. Therefore, the linking factor provided for by that provision refers to the Member State where the act giving rise to the alleged infringement occurred or may occur, not the Member State where that infringement produces its effects.*"³⁹ Consequently, jurisdiction under Article 97(5) "*may be established solely in favor of Community trade mark courts in the Member State in which the defendant committed the alleged unlawful act.*"

Thus, the Regulation on the European Union trademark establishes a system of specific international case-law rules for infringement litigation, which is attributed exclusively to the "European Union trademark courts". The European Union trademark courts are national courts of first and second instance designated by each Member State to have jurisdiction over the litigation regarding, especially, infringements of a European Union trademark.

But what is the territorial scope of the ruling provided by an European Union trademark court in litigation regarding trademark infringement on the internet? Should we consider that its scope extends to the entire European Union? Or, on the contrary, it must be accepted that it embraces only a part of the territory of the European Union? The jurisprudence was divided and that is why the French Court of Cassation has referred a question to the European Court.

The Court of Justice of the European Union had already had the occasion to underline its commitment to a uniform protection throughout European Union territory in a *Nokia case*⁴⁰. The Court sets out a principle tempered with some exceptions. The principle is clear: the ruling extends to the entire territory of the European Union. Indeed, the Court recalls that, in essence, the European Union trademark confers exclusive rights on the entire territory of the Union, which implies uniform protection.

The Court of Justice provides some exceptions to this principle. Thus, it recalls that the trademark holder may desire to limit the territorial scope of the ruling. The defendant can also argue that the territorial scope should be limited to a part of the territory of the European Union, even though it uses lawfully the

³⁸ CJEU, Case C-360/12, *Coty Germany*, EU:C:2014:1318;

³⁹ CJEU, Judgment in *Coty*, *ibid.*, paragraph 34;

⁴⁰ ECJ, Judgment in *Nokia case*, C- 316/05, EU:C:2006:789;

trademark, particularly because it does not use it as a brand only in certain countries. The Court gave the example of a linguistic pattern⁴¹.

Finally, the Court underlines, in the interests of effectiveness, that the measure decided by a national European Union trademark court has effect in Member States other than the court having jurisdiction, under the Brussels I BIS Regulation with respect to the procedure for recognition and enforcement of the judgment in other Member States.

3.4. Online infringement of copyright

The confusing aspect about copyright and the one causing practical difficulties is that it appears to share similarities, in terms of international jurisdiction, both with personality rights and with other IPRs.

Copyright forms part, indisputably, from the larger category of IP rights. Therefore, its protection is territorial. However, according to Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society⁴², copyright is protected Europe-wide without needing registration. This places it closer to personality rights, for jurisdictional purposes, than other IPRs such as, e.g., trademarks, which are only protected in the Member States where they have been registered.

Two judgments of the CJEU are highly relevant to illustrate the approach taken by the Court on the issue of international jurisdiction in relation to copyright.

The first of them is *Pinckney*⁴³, where Mr. Pinckney claimed to be the composer and performer of 12 songs that had been reproduced without his consent on a CD pressed in Austria by Mediatech, the defendant company, then marketed by two UK companies through various internet sites accessible in France. Mr Pinckney sued Mediatech before a Toulouse court. The defendant challenged the jurisdiction of the French courts, which decided to stay proceedings and asked the Court of Justice to clarify what is the proper interpretation of Article 7(2) of the recast, in the event of an alleged infringement of copyright committed by means of content placed online on a website.

AG Jääskinen was of the opinion that the principle of territoriality which governs the whole of IP law determines a close link between the dimensions of jurisdiction, applicable law and material right⁴⁴. He considered that IP cyber torts call for a new definition of the link between virtual conduct and a given territory. He distinguished between the nature of the various categories of copyright infringements, then

⁴¹ ECJ, Judgment in *Armacell Enterprise GmbH*, C-514 / 06P, EU:C:2008:511

⁴² OJ, L167/10,22.06.2001.

⁴³ CJEU, Case C-170/12, *Pinckney*, ECLI:EU:C:2013:400.

⁴⁴ Opinion Of Advocate General Jääskinen in *Pinckney v. KDG Mediatech AG*, para 45.

classified the alleged violation in the main proceedings as an infringement of distribution and communication rights. The AG proposed the targeting criterion as the relevant point of connection. He rejected the `centre of interests` criterion adopted in *eDate* based on the argument that, unlike the non-material damage resulting from personality rights violations, the economic damage caused by IPRs infringements does not have the necessary link with the localisation of the centre of the author's interests, but rather with the localisation of his public⁴⁵.

The CJEU, although maintaining the distinction between infringements of personality rights and infringements of IPRs, did not follow its AG's Opinion as regards the relevant connecting factor. It stated that determination of jurisdiction cannot depend on criteria which are specific to substantial law and which do not appear in Article 7(2)⁴⁶. Given that the only condition specified by the said Article is that a harmful event has occurred or may occur, the Court inferred that Article 7(2) does not require that the activity concerned be `directed to` the Member State in which the court seised is situated. It concluded that, for the purpose of establishing jurisdiction, it is enough that the Member State in which the court seised is situated protects the copyrights relied on by the claimant and that the harmful event alleged may occur within the jurisdiction of the court seised. In the particular circumstances of that case, the CJEU considered that the likelihood of damage occurrence originates from the possibility of obtaining a reproduction of a work protected by copyright from an internet site accessible within the jurisdiction of the court seised. However, that court has jurisdiction to determine only the damage caused within the Member State in which it is situated⁴⁷.

The *Pinckney* judgment has been criticized for supposedly allowing a too broad extension of jurisdiction based on a somewhat loose connection point. It has been argued in this regard that the Austrian defendant company, which neither acted, nor caused any effects through its own acts in France, could be sued in France only because a second UK company, which was not even a party in the main proceedings, made the website with infringing goods accessible in France, without having been established from the case file whether the defendant and the UK company had any kind of link between them⁴⁸.

The facts were even more complicated in the subsequent judgment given by the Court on this matter, namely *Pez Hejduk*⁴⁹. Ms Hejduk, domiciled in Austria, brought an action before a Vienna Court seeking a declaration of an infringement of copyright and damages as a result of photographs created by the plaintiff

⁴⁵ Ibid, para 70.

⁴⁶ CJEU, Case C-170/12, *Pinckney*, para 41.

⁴⁷ Ibid, para 45.

⁴⁸ M Husovec, `Comment on «Pinckney»`, p. 371.

⁴⁹ CJEU, Judgment in *Pez Hejduk v. EnergieAgentur.NRW GmbH*, Case C-441/13, ECLI:EU:C:2015:28.

being made available on the website of EnergieAgentur, the defendant, without her consent. EnergieAgentur had its seat in Düsseldorf (Germany) and its website operated under the top-level domain `.de`.

What makes this case more complex than *Pinckney* is the fact that the damage is a lot more difficult to quantify in a situation where a copyrighted material is merely placed on an internet website available in more than one jurisdiction than where it is sold through this kind of website. The situation is similar to the one pointed out in the chapter dedicated to online personality rights infringements.

There are hardly any reliable criteria to assess the amount of damage caused by merely accessing copyrighted material, unlike in the case of internet sale where one, for instance, could look at the number of paid downloads of the item, to estimate the value of remuneration due.

Given these evidentiary difficulties, the Advocate General in *Pez Hejduk* proposed that in these so-called cases of `delocalised` damage, jurisdiction should rest with the courts for the place where the event giving rise to the damage occurred⁵⁰ (the `causal event` rule).

Again the Court did not follow its AG's Opinion. The CJEU distinguished this case from *Pammer and Hotel Alpenhof*, reiterating that, unlike Article 17(1)(c) of Regulation No 1215/2012, the now Article 7(2) does not require, in particular, that the activity concerned be `directed to` the Member State in which the court seised is situated⁵¹. Therefore, for the purposes of attributing jurisdiction, it is irrelevant that the website at issue is not directed at the Member State in which the court before the action was brought is located. Consequently, the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the court seised, via the website in question, of the copyrighted material to which the rights relied on by the claimant pertain. However, in line with *Pinckney*, the Court ruled that, given the fact that the protection of copyright is territorial, a court seised on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member State⁵².

It would appear from the *Pinckney* and *Pez Hejduk* judgments that the CJEU endorsed the `mere access test`, in spite of criticism brought to this approach by various commentators and advocates general. However, the rulings of the Court have their supporters as well. It has been underlined, first, that they are consistent with previous case-law on cyber torts, namely *eDate Advertising and Others*, in the sense that the Court followed the same `access approach` there as well⁵³. Moreover, fears of *forum shopping* by plaintiffs

⁵⁰ Opinion Of Advocate General Cruz Villalón in *Pez Hejduk v. EnergieAgentur.NRW GmbH*, Case C-441/13, ECLI:EU:C:2015:28, para 47.

⁵¹ CJEU, Judgment in *Pez Hejduk v. EnergieAgentur.NRW GmbH*, para 32.

⁵² *Ibid*, para 36.

⁵³ R Matulionyte, `Enforcing Copyright Infringements Online`, p. 134-135.

might be overstated, since a national court will be able to award only damages occurred in the territory of the Member State to which it belongs⁵⁴.

Furthermore, it has been suggested that the `access test` could be applied when establishing jurisdiction and the `theory of focalization` at the level of substantive law, with the argument that the targeting approach has been used anyway mainly in the analysis of the merits of a case rather than on the jurisdictional conflict solving stage⁵⁵. The advantage of this method would be that, although at first sight claimants may seem to enjoy broad jurisdiction choices based on mere access, in effect they could only obtain compensation on the merits when a targeting intention on the part of the alleged perpetrator could be established⁵⁶.

This formula has been adopted, *mutatis mutandis*, in the main proceedings in the *Wintersteiger* case where, although the Austrian court seised by the applicant assumed jurisdiction, it found no violation on the substance, as it stated that the claimant had failed to prove more than insignificant effect on the Austrian market arising from the use of its trade mark as a keyword on *google.de*⁵⁷.

One may wonder, however, whether this approach is the most adequate. After all, what would be the point of allowing jurisdiction to a court according to the mere access criterion if the right holders cannot be awarded damages in the end, unless they prove that the allegedly infringing conduct was directed at the audience of the Member State of the court seised? This would be a typical case of an `empty jurisdiction`⁵⁸.

Although commentators have warned against confusing the matter of jurisdiction with the substantive law⁵⁹, it would seem that in the particular case of cyber torts, they are intertwined to a greater extent than in other non-contractual liability actions.

It is submitted therefore that, in copyright cases, allowing a `centre of interests` criterion, similar to the one developed by the ECJ for personality infringements, would be welcome. Or, at the legislative level, Regulation 1215/2012 may be amended by providing the possibility of a *forum actoris* in copyright litigation.

There are several reasons for such a proposition. As has been shown, intellectual property is a tool for encouraging innovation, therefore IP jurisdiction rules should afford greater protection to IP owners⁶⁰. Such

⁵⁴ E Rosati, `Brussels I Regulation and Online Copyright Infringement: «Intention to Target» Approach Rejected`, in *Journal of Intellectual Property Law & Practice*, vol. 9, no. 1/2014, p. 19.

⁵⁵ R Matulionyte, `Enforcing Copyright Infringements Online`, p. 135.

⁵⁶ *Ibid*, p. 135.

⁵⁷ `Wintersteiger III`, Decision of the Supreme Court (Oberster Gerichtshof) 10 July 2012 – Case No. 4 Ob 82/12f, apud IIC, vol. 44, no. 8/2013, p. 997.

⁵⁸ See, for that term, M Husovec, `Comment on «Pinckney»`, p. 372.

⁵⁹ See, for instance, A. SAVIN, J. TRZASKOWSKI, *Research Handbook on EU Internet Law*, ed. Edward Elgar, 2014, p. 239-240.

a solution would be in any case more predictable than the `access` method, which allows the plaintiff to bring an action in virtually any jurisdiction, as the potential defendant could take steps to discover the centre of interests/domicile of the person whose copyright it infringes. Moreover, the argument of ensuring foreseeability for the defendant does not appear to be a very compelling one. After all, if one plans to use another person's copyrighted material without asking for the right holder's authorization, one ought to assume the risk of being sued at some point.

On the other hand, in case of large multinational corporations, a global presence might lead to an expectation of litigating globally as well⁶¹.

As has been shown above, both the accessibility test and the targeting one have their drawbacks. In the case of the former, the greatest issue is represented by an overly multiplication of courts entitled to have jurisdiction. As for the latter, there are no clearly enough defined factors for establishing the targeting intention.

A centre of interests criterion would be preferable because it would better protect the interests of the claimants, as they could bring an action for the entire damage caused by copyright infringement in the jurisdiction with which they have the most and strongest connections, without having to prove a targeting intention on behalf of the defendants. Moreover, if we consider, for example, facts like those in *Pinckney*, where companies from more than one jurisdiction were involved, it can hardly be considered fair for the victim of copyright infringement having need to start an actual investigation in order to determine which of those companies targeted which audience and whether they were linked somehow.

We do not agree with AG Jääskinen's argument in *Pinckney* that, in case of IPRs, the damage is rather connected to the localisation of the author's public. To our understanding, the Court designed the `centre of interests` test as a flexible criterion to determine where would the plaintiff be most entitled to bring an action. For copyright, the localisation of the main audience may well correspond to the right holder's centre of interests.

This test would also profit the alleged perpetrators as, most of the times, the centre of the interests of the right holder is foreseeable and, in any case, it would narrow down the plaintiffs' possibilities for *forum shopping*.

⁶⁰ E. Treppoz, `Jurisdiction in Internet-related Intellectual Property Disputes`, Conference on Jurisdiction and Dispute Resolution in the Internet Era, Geneva available at <http://www.unige.ch/droit/internet-disputes/OnlineResources/treppoz-article.pdf>, p. 8, last accessed April 25th 2016.

Chapter 4. Concluding remarks

The online environment is subject to transformation on a daily basis. It is difficult to predict the way technology will evolve. However, it is certain this evolution will continue to exert an influence on legal norms, particularly those regarding jurisdiction. The ECJ will need to adapt its case-law in the field of cyber torts to nowadays realities.

When deciding on jurisdiction in this area of the law, one must also take into consideration the provisions of the Charter of Fundamental Rights and ECHR case-law. In this respect, as shown in the present paper, cyber torts are likely to affect personality rights to an extended degree. We consider that the Court will be consistent, in this area of the law, with its interpretive case-law regarding Articles 7 and 8 Charter of Fundamental Rights⁶².

According to the Court's interpretation, online posting of defamatory content is liable to negatively affect fundamental personality rights, which potentially concern a vast number of aspects of a person's private life. Furthermore, the Court has stated that the effect of the interference with those rights is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained ubiquitous⁶³.

In spite of this conflicting case-law, taking into account the problems identified above, we believe that some general principles should govern further developments in the matter of cyber torts jurisdiction, for the purposes of coherence, consistency and foreseeability.

Therefore, we consider the following suggestions commendable:

1. Regarding personality rights, the mosaic principle of the *Shevill* doctrine should be replaced with the test developed in the *eDate Advertising and Others* judgment.

2. In respect of trademarks, the applicable law on the merits ought to be taken into account when deciding on jurisdiction because of the strong connection between them and in order not to be confronted with a denial of justice situation.

3. As for copyright, the extension of the `centre of interests` criterion would be advisable in order to allow the right holder to obtain full compensation for all the damage caused. In the context of copyright, it would be preferable that the centre of interests should be established based rather on the work, instead of the author, so as to reconcile practical considerations for choosing this specific criterion with the territoriality of copyright.

⁶¹ Ibid, p. 8.

⁶² <http://fra.europa.eu/en/charterpedia/article/7-respect-private-and-family-life> and http://fra.europa.eu/en/case-law-database/field_info_charter_article%253Asource/13127.

⁶³ CJEU Case C-131/12, *Google Spain and Google*, EU:C:2014:317.